

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 01-08-90097

BEFORE
Lynch, Chief Circuit Judge

ORDER

ENTERED: FEBRUARY 5, 2009

Complainant, a litigant, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge in the First Circuit. The complainant alleges that the judge exhibited bias and engaged in impropriety in connection with the complainant's civil action.

The complainant first alleges that the judge improperly and without adequate reason compelled the complainant to undergo a psychiatric examination. The complainant next alleges that the judge failed to enforce a local rule and other provisions of federal law that require the complainant's personal and medical records to be kept confidential. The complainant states that this information appeared in exhibits filed with the defendants' motion for summary judgment (and on the court's publically accessible website) and required the complainant to file an emergency motion to seal. The complainant includes with this charge accusations of wrongdoing by defense counsel who, the complainant asserts, failed to redact this personal data before submitting it to the court. Also in connection with the summary judgment motion, the complainant contends that the judge

failed to penalize defense counsel for clear violations of Fed.R.Civ.P. 11 (when “declarations” made in the defendants’ summary judgment motions conflicted with the evidence).

The complainant further charges that the judge improperly changed a final pretrial conference to a status conference at which he allowed argument on the defendants’ summary judgment motion without a court reporter in attendance. The complainant continues that, at this conference, the judge expressed his personal bias by telling the complainant to “get on with [her] life,” and that she is “too sensitive.”

The complainant asserts that, as a result of these statements by the judge, her counsel did a “complete about-face,” encouraged the complainant to accept an unreasonably low settlement offer, and ultimately withdrew shortly before trial. The complainant explains that, due to concerns raised by the judge’s mandated psychiatric examination, the complainant was then unable to retain adequate replacement counsel. The complainant concludes that the judge issued conflicting and unclear orders regarding the attempt to find replacement counsel, and appointed a patent infringement lawyer to represent the complainant in her employment discrimination case. Finally, the complainant states that clerk’s office staff failed to docket the complainant’s notice of appeal.

As an initial matter, the complainant’s allegations of wrongdoing by defense counsel are not cognizable under the judicial misconduct statute. See Rules for Judicial-Conduct and Judicial-Disability Proceedings (Rules of Judicial Misconduct), Rule 4. Nor are clerical errors (or malfeasance) indicative of judicial wrongdoing. See Lynch, C.C.J., Order, In Re: Complaint Nos. 01-08-90012, and 01-08-90013, July 29, 2008, at 9, and cases cited.¹

¹Nevertheless, staff of the Office of the Circuit Executive has addressed the alleged clerical error in the docketing of the complainant’s appeal.

A review of the case docket, relevant pleadings and court orders indicates that the complainant initially filed the case, through counsel. The parties filed amended pleadings and engaged in discovery before the defendants filed a motion to conduct a mental examination of the complainant under Fed.R.Civ.P. 35. Despite the complainant's opposition, the court allowed the motion.

Thereafter, the complainant filed an emergency motion to seal the defendants' motion for summary judgment on the ground that, as alleged in the misconduct complaint, the motion contained personal information of the complainant's not suitable for publication on PACER. The judge allowed this motion the day after it was filed.

The complainant then filed an opposition to the summary judgment motion, as well as a motion for default judgment. The judge denied the latter motion and, later that month, held the conference referenced in the complaint. The docket indicates that, as alleged, the proceeding was changed from a final pretrial conference to a status conference, and that the court heard from the parties, through counsel, on the defendants' motion for summary judgment. After the hearing but before ruling on the motion, the judge issued an order directing the complainant to file a revised opposition to the defendants' summary judgment motion in order to "contest the issues raised by the defendants' motion and not respond by merely arguing discovery disputes." The complainant filed a memorandum of law and the judge granted the summary judgment motion in part, and denied it in part. The court simultaneously issued a scheduling order, including a trial date on the pending counts.

It appears from the record that, shortly before trial, the complainant's counsel filed a motion to withdraw, and that this motion was referred to a different district judge who allowed it and gave

the complainant roughly 60 days in which to retain new counsel.² Upon the complainant's subsequent request, the subject judge extended this deadline another 60 days. Notified of the complainant's inability to retain counsel, the court then held a status conference, after which the judge appointed pro bono counsel to represent the complainant.

When appointed counsel declined to accept the case, the judge issued an order staying the trial until counsel could be retained, explaining that "the case cannot be effectively tried without competent counsel." Several weeks later, the court revoked the order appointing pro bono counsel on the ground that the complainant would not accept available counsel, instead indicating that she wanted to proceed pro se.

Thereafter, the complainant filed another motion for default judgment, pro se, which the judge denied. Several months later, the judge ordered the case dismissed if the complainant did not, within 30 days, retain counsel or indicate her willingness to accept court-appointed counsel. The case was closed the following month.

The complaint is without merit. The reviewed record provides no evidence of bias or wrongdoing. The docket confirms that the judge issued an order to seal promptly upon receiving notice of the potential release of the complainant's personal data in the defendants' summary judgment motion. Further, the applicable court rule places the burden of redacting private information on the litigants, not on the court. Accordingly, any charge that the judge committed misconduct in this regard is dismissed as frivolous pursuant to 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

The judge's decision to address the summary judgment motion at the hearing was also not

²The record does not indicate why this motion was handled by a different judge.

suggestive of wrongdoing. Moreover, after this hearing, the judge offered the complainant an additional opportunity to brief the relevant issues before ruling on the matter. Nor do the facts indicate that the judge was under any legal or ethical obligation to address alleged misconduct by defense counsel. These charges are, therefore, dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

Insofar as the judge may have, during this hearing, voiced opinions relating to the merits of complainant's case or her likelihood of success (i.e., that she should "get on with [her] life," or that she is "too sensitive"), such statements are not alone suggestive of bias. See e.g., Boudin, C.C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 3-4, and *cases cited* (The formation and expression of a judge's views of the merits of a case, where those views rest upon the evidence and are not voiced in the presence of a jury, do not constitute bias.). Any such charge against the judge is, likewise, dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). See also Rules of Judicial Misconduct, Rule 11(c)(1)(A).

The record is equally devoid of any information suggesting that the judge sought to subvert the complainant's success at obtaining competent replacement counsel. The court made multiple attempts to obtain pro bono counsel with whom the complainant would be satisfied, although to no avail. See 28 U.S.C. § 352(b)(1)(A)(iii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(C).

As there is no evidence of bias, the allegations arising from the complainant's disagreement with orders issued by the court – including, but not limited to, the order requiring the complainant to undergo a psychiatric examination, the order on the summary judgment motion, and the order of dismissal – are dismissed as not cognizable. See 28 U.S.C. § 352(b)(1)(A)(ii). See also Rules of Judicial Misconduct, Rule 11(c)(1)(B).

For the reasons stated, Judicial Misconduct Complaint No. 01-08-90097 is dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), and 352(b)(1)(A)(iii).

Date

2/5/09

Chief Judge Lynch

Sandra L. Lynch